DATIN MELATI ABDULLAH & ORS

v.

SYED HASSAN SYED SALIM

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-738-1997]
6 JUNE 1998

CIVIL PROCEDURE: *Affidavits - Whether counsel conducting case can affirm affidavit - Failure to state source of information and belief in affidavit - Whether rendered affidavit irregular - Whether irregularity curable - Rules of the High Court 1980, O. 41 r. 5(2)*

CIVIL PROCEDURE: *Affidavits - Application to extend time to file affidavit-in-reply - Discretion of court to extend time - Rules of the High Court 1980, O. 3 r. 5 - Whether there was injustice to other party - Whether there was substantial delay - Whether reasons were given for delay*

This was an application by the defendant to extend time to file an affidavit-in-reply under O. 32 r. 1(2) of the Rules of the High Court 1980 ('RHC'). It was supported by an affidavit affirmed by the counsel for the defendant who deposed that the defendant had only sought his service after the time period for filing the affidavit-in-reply had lapsed. Also, that he believed that the defendant had merit in the case and that the delay was not intentional, and that if the application was not allowed, it would prejudice the defendant.

Held:

[1] Counsel for the defendant having conduct of the instant case should not affirm an affidavit deposing to facts and matters not within his own knowledge. In matters where disputed questions of facts are involved, it would be best that the parties and not their solicitors affirm affidavits thereto.

[2] In affirming the affidavit in encl. 10, counsel for the defendant did not state the source of the information or belief. An affidavit of information and belief which did not state the source of the information and belief was irregular and inadmissible as evidence. Further, in affirming encl. 10, counsel for the defendant ran counter to O. 41 r. 5(2) of the RHC, an irregularity that was incurable.

[3] The object of O. 3 r. 5 of the RHC is to give the court the all pervading discretion to extend time to avoid injustice to the aggrieved parties. However, where there is substantial delay without any explanation being offered, the court is entitled to exercise its discretion to refuse to extend time. And this is so even though the delay can be compensated for by costs and notwithstanding that no injustice is done to the other party.

[4] There was a delay of three months and three days when the application for enlargement of time was filed. The reason for the delay was not explained at all. It was merely deposed that the delay was unintentional and that the defendant had merits in these proceedings. The undue delay was a material factor that tilted the scale of justice in favour of the plaintiffs.

[Application dismissed.]

Cases referred to:
Attwood v. Chichester [1878] 3 QBD 723 ***(refd)***
Australasian Automatic, etc, Co v. Walter [1891] WN 170 ***(refd)***
Eaton v. Storer [1882] 22 Ch D 92 ***(refd)***
Gilbert v. Endean [1878] 9 Ch D 259 ***(refd)***
Keymer v. Reddy [1912] 1 KB 221 ***(refd)***
KS Chua & Co v. Chui Miang Chew & 5 Others [1996] 2 CLJ 676 ***(aff)***
Lumley v. Osborne [1901] 1 KB 532 ***(refd)***
Perwira Affin Bank Bhd (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Bhd) v. Lorrain Esme Osman [1996] 4 MLJ 656 ***(refd)***
Pole-Carew v. Western Counties Manure Co Ltd [1919] 89 LJ Ch 100 ***(refd)***
Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(aff)***
Ratnam v. Cumarasamy [1965] 1 WLR 8 ***(foll)***
Re J (An Infant) [1960] 1 WLR 253 ***(refd)***
Re JL Young Manufacturing Company Ltd [1900] 2 Ch 753 ***(refd)***
Rossage v. Rossage [1960] 1 WLR 249 ***(refd)***
Saunders v. Pawley [1885] 14 QBD 234 ***(refd)***
Savings and Investment Bank Ltd [1984] 1 WLR 271 ***(refd)***
Schafer v. Blyth [1920] 3 KB 143 ***(refd)***
Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 ***(foll)***
Yogananthy a/p AS Thambaiya v. Idris bin Osman [1997] 5 CLJ 705 ***(aff)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5, O. 32 rr. 1(2), 13(2)(b), O. 41 r. 5(2)

Rules of the Supreme Court 1883 [UK], O. 38 r. 3

For the plaintiffs - Fadzilah Mansor; M/s Jackson & Masacorale
For the defendant - Joseph Mathews PM Mathews; M/s Radzuan Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

The defendant sought by way of encl. 11 to extend time to file an affidavit-in-reply under O. 32 r. 1(2) of the Rules of the High Court 1980 ("RHC") (it should be O. 32 r. 13(2)(b) of the RHC) and it was supported by an affidavit of Mr. Joseph Mathews a/l P.M. Mathews ("Mr. Joseph Mathews"), counsel for the defendant, in encl. 10. Counsel having conduct of this case should not affirm an affidavit deposing to facts and matters not within his own knowledge. One must take note of the salutary warning given by Edgar Joseph Jr J (now FCJ) in *Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 where his Lordship rightly pointed out that in matters where disputed questions of facts are involved, it would be best that the parties and not their solicitors to affirm affidavits thereto. Kamalanathan Ratnam JC (now J) in *Perwira Affin Bank Bhd (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Bhd) v. Lorrain Esme Osman* [1996] 4 MLJ 656 aptly said at p. 662 of the report:

> An advocate and solicitor should be a percussionist of his client's case; not a protagonist in its cause. If he descends into the arena of the trial by affirming an affidavit relating to disputed facts, he could be subjected to the usual process of cross-examination. How far then can he extend the right of privilege? Issues such as these ought to be in the forefront of the mind of a solicitor before he rushes in to affirm an affidavit upon his client's cause.

In affirming the affidavit in encl. 10, Mr. Joseph Mathews deposed, *inter alia*:

> 1. I am an advocate and solicitor of the High Court of Malaya practising under and in the name and style of Messrs Radzuan Ibrahim & Co, solicitor for the abovenamed defendant.
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> 2. I am the counsel having conduct of this case and I am authorised to affirm this affidavit.

and in so doing he did not state the source of the information or belief. In *Re JL Young Manufacturing Company Ltd* [1900] 2 Ch 753 it was held that an affidavit of information and belief, which did not state the source of the information and belief, was irregular and therefore inadmissible as evidence. I am aware that that case was governed by the then O. 38 r. 3 of the Rules of the Supreme Court 1883, which provided that "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted ... .", but nevertheless the principle of law distilled from that case may be used as a guideline. In *Savings and Investment Bank*

Ltd [1984] 1 WLR 271, the court vigorously applied *Re JL Young Manufacturing Co. Ltd [supra]* and held that statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed. In encl. 10, Mr. Joseph Mathews did not even depose that he affirmed the affidavit based on information and belief and that being the case he naturally did not reveal the sources and grounds of the information and belief. I cannot help but feel constrained to say that Mr. Joseph Mathews must have taken unto himself to affirm encl. 10 without thinking of the dire consequences that may flow from it including the inadmissibility of what he had deposed.

Order 41 r. 5(2) of the RHC states as follows:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

and the meaning to be attached to the words "interlocutory proceedings" must surely be circumscribed by the word "interlocutory" which in essence refer to those applications which do not decide the rights of the parties (*Gilbert v. Endean* [1878] 9 Ch D 259; *Rossage v. Rossage* [1960] 1 WLR 249 CA; and *Re J (An Infant)* [1960] 1 WLR 253, [1960] 1 All ER 603). The Court of Appeal in *Re JL Young Manufacturing Co [supra]* took exception and commented in strong terms on the irregularity of an affidavit founded upon information and belief without giving the source of such information and belief. In the same vein, reference to the case of *Lumley v. Osborne* [1901] 1 KB 532 must also be made. In my judgment, in affirming encl. 10 Mr. Joseph Mathews has run counter to O. 41 r. 5(2) of the RHC – an irregularity that was incurable. Be that as it may, I will now consider encl. 10 apart from the ones reproduced earlier in this judgment. There were only four short paragraphs in encl. 10 apart from the ones reproduced earlier in this judgment. There it was deposed that the defendant had to file an affidavit-in-reply within fourteen days of the receipt of the plaintiffs' affidavit in encl. 2 which was in support of the originating summons in encl. 3 (where the prayer was for the defendant to cease as an administrator of the estate of Syed Salim bin Hassan Alattas). It was also deposed that the defendant only came to the office of Mr. Joseph Mathews at the end of the month of December 1997 when the time period for filing the affidavit-in-reply had lapsed. Mr. Joseph Mathews deposed that he believed that the defendant had merit in the present proceedings and that the delay was not intentional and craved for the court's indulgence, more in the nature of an apology, for the delay. Finally, it was deposed that in the event the defendant's application for abridgment was not allowed it would prejudice the defendant.

By way of a rebuttal to encl. 10, the plaintiffs filed an affidavit-in-reply in encl. 9 and there they disclosed the source of their information and belief. The plaintiffs deposed that they were advised by their solicitors and verily believed that:

(i) The defendant was served with a copy of the originating summons dated 13 August 1997 (encl. 3) together with the affidavit dated 11 August 1997 (encl. 2) since 13 November 1997 and this can clearly be verified by reference to an affidavit of service deposed by Daud bin Haron on 25 November 1997 as seen in encl. 4.

(ii) Since 23 December 1997 the defendant was served with a notice to hear the originating summons that was dated 27 November 1997 as reflected in encl. 5 which was fixed for hearing on 19 January 1998. Verification of this service can be found in the affidavit of service affirmed by Daud bin Haron on 2 January 1998 as seen in encl. 6.

(iii) The defendant did not show any interest on receipt of encls. 3, 2 and 5, and chose to ignore his responsibility as a defendant. For this reason, the defendant must be held accountable. Mr. Joseph Mathews himself had deposed in encl. 10 that the defendant only came to his office towards the end of the month of December 1997.

(iv) The delay by the defendant was intentional and it clearly prejudiced the estate of Syed Salim bin Hassan Alattas and his beneficiaries.

(v) For these reasons, the defendant's application in encl. 11 should be dismissed with costs.

Mr. Joseph Mathews realised that he had an uphill task in advancing the application in encl. 11 and he knew and realised that the success rate was practically zero. He magnanimously submitted that encl. 11 should be dismissed with costs after hearing the submissions of Miss Fadzilah Mansor, learned counsel for the plaintiffs. Notwithstanding the fact that encl. 11 was grounded on O. 32 r. 1(2) of the RHC (as I said it should be O. 32 r. 13(2)(b) of the RHC), Mr. Joseph Mathews changed his stand and submitted that encl. 11 was based on O. 3 r. 5 of the RHC which reads as follows:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

In *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399 ;[1996] 5 MLJ 241, I did say emphatically that:

> Order 3, rule 5 (1) of the RHC gives the court the discretion to extend time and it states explicitly that:
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> > The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> In practice, an application to extend time is generally allowed provided no injustice is caused and the other party can be compensated by costs. However, there must always be before the court cogent material to satisfactorily explain the delay before the court will exercise its discretion to extend time: *Thamboo Ratnam v. Thamboo Cumarasamy & Anor* [1965] 1 WLR 8. Thus, when an applicant failed to advance any reason as to why the writ was not served during the period of its validity, the court would not readily exercise its discretion in favour of extending time to renew the writ: *Lloyd Triestino Societa v. Chocolate Products (M) Sdn Bhd* [1976] 2 MLJ 27, FC. From the authorities both foreign and local, two distinct principles can be garnered. The first principle is the time honoured principle that the rules of court and the associated rules of practice, devised by the rules committee and developed by the courts over the years to promote the expeditious despatch of litigation, must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto. This time honoured principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit. Thus, O. 19 r. 1 of the RHC (default in service of statement of claim), O. 24 r. 16(1) of the RHC (failure to comply with requirement for discovery etc), O. 25 r. 1(4) of the RHC (failure of plaintiff to take out summons for directions, then the defendant may apply to dismiss the action), O. 28 r. 10(1) of the RHC (failure to prosecute proceedings with despatch), and O. 34 r. 2(2) of the RHC (failure of the plaintiff to set down action for trial, the defendant may set down the action for trial or may apply to the court to dismiss the action for want of prosecution) are some examples set by the Rules Committee. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.
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> The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is clearly reflected in the general discretion to extend time conferred by O. 3 r. 5(1) of the RHC as reproduced earlier on, and this discretion is to be exercised in accordance with the requirements of justice in the particular case. Broadly stated this principle is also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

In *Ong Guan Teck & Ors v. Hijjas* [1982] 1 MLJ 105, Hashim Yeop A Sani J (as his Lordship then was) observed:

> The court has an unfettered discretion to grant or refuse an extension of time. The rules of court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period.
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> In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the court exercising the discretion. On the facts of the present case ... there was not any valid ground for the delay and therefore ... the application for extension of time [must be refused].

In my judgment, these two principles expounded earlier are not absolute. If the first principle were rigidly and vigorously enforced, procedural default would lead to dismissal of actions' without any considerations of whether the plaintiff's default had caused prejudice to the defendant. But the court's approach and practice has been and it will continue to be so in that it would treat the existence of such prejudice as a crucial, and often a decisive, matter. On the other hand, if the second principle were followed rigidly without exception, a wealthy plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would not suffer any penalty until and unless the defendant could demonstrate the presence of prejudice. And if this happens it would certainly circumscribe the very general discretion conferred by Order 3, rule 5 of the RHC; indeed it would involve a substantial rewriting of the rule to the dislike of the Rules Committee.

In almost similar vein, I did say in *Yogananthy a/p AS Thambaiya v. Idris bin Osman* [1997] 1 AMR 670, especially at pp. 677 and 678 that:

> Order 3, rule 5(1) of the RHC was called in aid by the plaintiff in an attempt to convince this court that enclosure 19 should be received in evidence. I beg to disagree. I must at once put a caveat that the court's power to extend time, if there was an application of that nature which unfortunately there wasn't any, can never be used as 'an easy escape route for those who did not conduct their client's cases with reasonable expedition' (per May L.J. in *Smith v. Secretary of State for the Environment* (reported in the Times, July 6, 1987). With reasonable diligence the plaintiff could have prepared enclosure 19 expeditiously through her solicitors and avoid the pitfalls of Order 32, rule 13(2)(b) of the RHC. Mr. P.K. Nathan rightly submitted that he was entitled to raise a procedural point for the defendant. The Singapore Court of Appeal in *Kuah Kok Kim v. Chung Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129 held the view that notwithstanding the very wide powers given to

the court to remedy the non-compliance with the rules, the court ought not to exercise its discretion to remedy it where the failure or non-compliance with the rules was so fundamental or serious. Thus, for example the failure of the party to renew the writ within the time specified in the rules was such a fundamental defect in the proceedings that it was held that it was not a proper case for the exercise of the discretion: *Bernstein v. Jackson* [1982] 1 WLR 1082. At the end of the day, what amounts to a fundamental or serious breach must be dependant on the facts of each case. In my judgment, enclosure 19 should be disregarded as it contravened Order 32, rule 13(2)(b) of the RHC and, consequently, to allow an adjournment to enable the plaintiff to file an application to abridge time in order to file enclosure 19 would make a mockery of the rules in that it would allow the plaintiff to take advantage of his breach to his benefit. This court would not be idle and let the plaintiff defeat the very purpose and object of Order 32, rule 13 (2)(b) of the RHC.

On O. 32 r. 13(2)(b) of the RHC, I had this to say in *KS Chua & Co. v. Chui Miang Chew & 5 Others* [1996] 2 CLJ 676; [1995] 3 AMR 44: 2605; [1995] 4 MLJ 436:

Now, reverting back to Order 32, rule 13 (2)(b) of the RHC which came by way of an amendment *vide* (PU(A) 193/93) where it imposes on a party wishing to reply to an affidavit served on him, a mandatory obligation to file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him unless provided by the rules. This onerous obligation is also placed on the applicant who files affidavit in support of his application to file and serve on the other party within 14 days from the date of the filing of the said application (see Order 32, rule 13 (2)(a) of the RHC). Thus, under this new Order 32, rule 13 (2) of the RHC a strict time-table has been set by the Rules Committee and my impression of it is that it is draconian as it does not give much room space to manoeuvre for the applicant to file a further affidavit in support of his application after 14 days from the date of filing of the application.

On obedience to the RHC, I had this to say in *Punca Klasik Sdn Bhd v. Seok Kim Leow [supra]*:

The first principle is the time honoured principle that the rules of Court and the associated rules of practice devised by the Rules Committee and developed by the courts over the years to promote the expeditious despatch of litigation must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto.

The defendant here sought to enlarge time and this court certainly has an inherent jurisdiction to extend time independently of O. 3 r. 5 of the RHC (*Keymer v. Reddy* [1912] 1 KB 221 CA; *Pole-Carew v. Western Counties Manure Co Ltd* [1919] 89 LJ Ch 100 CA). Of course, if there was consent

all round, time can easily be extended (*Australasian Automatic, etc, Co. v. Walter* [1891] WN 170). It was not the case here. It is obvious that the object of O. 3 r. 5 of the RHC is to give the court the all pervading discretion to extend time with a view, solely, to avoid injustice to the aggrieved parties (*Schafer v. Blyth* [1920] 3 KB 143; and *Saunders v. Pawley* [1885] 14 QBD 234). Bramwell LJ did say in *Attwood v. Chichester* [1878] 3 QBD 723 CA that:

> When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.

However, where there is excessive delay the court may be induced to exercise its discretion to refuse to extend time (*Eaton v. Storer* [1882] 22 Ch D 92 CA). All things being equal, I prefer the principle of law enunciated in *Ratnam v. Cumarasamy* [1965] 1 WLR 8; [1964] 3 All ER 933 PC and it may be paraphrased in these words. The Rules of the Supreme Court as to time have to be observed strictly, and if substantial delay occurs without any explanation being offered, the court is certainly entitled, in the exercise of its judicial discretion, to refuse the extension of time. And this is so even though the delay could be compensated for by costs and notwithstanding that no injustice would be done to the other party.

Was there substantial delay here that went unexplained? It must be recalled that encls. 3 and 2 were served onto the defendant on 13 November 1997. The application by way of a summons-in-chambers in encl. 11 to enlarge time was filed on 16 February 1998, a delay of three months and three days of inactivity. The defendant went into deep slumber. The affidavit in encl. 10 did not explain the reason for the delay at all. It merely deposed that the delay was unintentional and that the defendant had merits in these proceedings. The undue delay here was a material factor that tilted the scale of justice in favour of the plaintiffs. There was no valid ground for the delay and this court must refuse to exercise its discretion to extend time. Enclosure 11 must be dismissed with costs.